

SERVED: August 22, 1994

NTSB Order No. EA-4229

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 8th day of August, 1994

_____)	
DAVID R. HINSON,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-12680
v.)	
)	
ALEX BUTCHKOSKY,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

Respondent has appealed from an order issued by
Administrative Law Judge Jimmy N. Coffman on February 26, 1993,¹
affirming, on the Administrator's motion for summary judgment,
the revocation of respondent's commercial pilot and flight
instructor certificates pursuant to 14 C.F.R. 67.20(a)(1) and

¹ A copy of the order is attached.

61.15.² For the reasons discussed below, we remand this case for a hearing on the merits of the section 67.20(a)(1) charge, and on the issue of sanction for the section 61.15 charge.

The Administrator's order of revocation/complaint, as amended, alleged that on September 22, 1989, respondent was convicted of conspiracy to import marijuana, importation of marijuana, and possession with intent to distribute marijuana, in violation of 21 U.S.C. 963, 952(a), 960(a)(1), and 841(a)(1). The order noted that respondent's conviction was grounds for revocation under section 61.15. The Administrator further alleged that on a March 22, 1990 application for an airman medical certificate respondent answered "no" to item 21w on the application form (asking whether the applicant has a record of "other convictions"). It was alleged that this negative answer

² **§ 67.20 Applications, certificates, logbooks, reports, and records: Falsification, reproduction, or alteration.**

(a) No person may make or cause to be made --

(1) Any fraudulent or intentionally false statement on any application for a medical certificate under this part.

§61.15 Offenses involving alcohol or drugs.

(a) A conviction for the violation of any Federal or state statute relating to the growing, processing, manufacture, sale, disposition, possession, transportation, or importation of narcotic drugs, marihuana, or depressant or stimulant drugs is grounds for --

* * *

(2) Suspension or revocation of any certificate or rating issued under this part.

* * *

was fraudulent and intentionally false, in violation of section 67.20(a)(1). The parties entered into a joint stipulation of facts which established that respondent had been convicted as alleged in the complaint, and that he had voluntarily withdrawn his appeal from that conviction, but that he had filed a motion to vacate the conviction which was then pending.³ It was further stipulated that respondent had answered "no" to question 21w on the medical application form, as alleged in the complaint.

The Administrator subsequently filed a motion for judgment on the pleadings and/or summary judgment, in which he asserted that, in light of respondent's undisputed drug conviction, no genuine issues of fact remained to be resolved as to the conviction. He attached to the motion a copy of the conviction and the underlying indictment. On the issue of sanction, the Administrator argued that revocation under section 61.15 was reasonable and consistent with Board precedent. In contrast, the Administrator did *not* assert that no material issues remained as to the falsification charge, but rather stated simply that the falsification issue "could be moot if this motion is granted in its entirety." Nonetheless, the Administrator concluded his motion with a request that the law judge affirm the complaint "in its entirety."

Respondent opposed the Administrator's motion, asserting

³ Respondent represented in his appeal brief, filed March 24, 1993, that the motion (there referred to as a "habeas corpus motion" seeking to reverse the conviction) was still pending as of that time.

that neither judgment on the pleadings nor summary judgment was appropriate, as there were unresolved material issues of fact with regard to the falsification charge under section 67.20(a)(1). Specifically respondent argued that a hearing was necessary to resolve the critical issue of whether respondent's "no" answer to item 21w on the medical application was intentionally false or fraudulent (i.e., made with knowledge of its falsity and/or intent to deceive).⁴ He further argued that unresolved factual issues remained as to the appropriate sanction to be applied under section 61.15 for his drug conviction, noting Board precedent which indicates that suspension may be the proper remedy for a drug conviction when (as in this case) the conviction did not involve the use of an aircraft.⁵

The law judge granted the Administrator's motion for summary judgment and affirmed the order of revocation "in all respects."

Although the law judge stated in his order that he had considered respondent's answer in opposition to the Administrator's motion, his order included no explanation of the

⁴ Respondent cited Administrator v. Juliao, NTSB Order No. EA-3087 (1990), where we held that actual knowledge of falsity must be shown to establish a violation of section 67.20(a)(1).

⁵ Respondent cited three cases involving drug offenses where we affirmed suspension rather than revocation: Administrator v. Rahm, 2 NTSB 988 (1974); Administrator v. Ballan, 2 NTSB 1136 (1974); and Administrator v. Freeze, 3 NTSB 1794 (1979). He also cited Administrator v. Davids, NTSB Order No. EA-3740 at 2 (1992), where we affirmed revocation, as the drug offense in that case involved the operation of an aircraft, but acknowledged that in prior cases involving offenses unrelated to the operation of an aircraft a period of suspension had been deemed the proper remedy.

basis for his apparent rejection of respondent's arguments.

On appeal, respondent argues that the law judge erred in granting the Administrator's motion for the reasons he asserted below. In sum, he maintains that he did not intentionally falsify the medical application form, and that summary judgment on the falsification charge was "plain error" absent proof that he did. He also asserts that he is entitled to an opportunity to present evidence on the facts and circumstances surrounding his conviction, so as to demonstrate that a sanction less than revocation is warranted. Respondent asks that the case be remanded for a hearing on these issues.

The Administrator agrees that summary judgment was inappropriate on the falsification charge, and concurs in respondent's position that the case should be remanded on that issue.⁶ We agree with the parties that summary judgment was improperly granted on the issue of whether respondent made an intentionally false or fraudulent statement, and that respondent should be given the opportunity for a hearing on that charge. Accordingly, the case is remanded for that purpose.

On the issue of whether respondent's conviction warrants revocation under section 61.15, the Administrator contends that summary judgment was appropriate. While acknowledging that prior Board case law under that regulation has drawn a distinction, for

⁶ We note that the Administrator's motion for summary judgment, although ambiguous, could have been read to indicate a willingness to abandon the falsification charge if revocation was affirmed for respondent's drug conviction. His position on appeal, however, suggests no such willingness.

purposes of determining the proper sanction, between drug offenses involving aircraft use and those that do not, the Administrator asserts that more recent Board decisions indicate that the use or nonuse of an aircraft is no longer dispositive in such cases.⁷ Indeed, we have recently affirmed revocation in many cases where the drug offense underlying the section 61.15 charge, though not involving the use of an aircraft or airman certificate, was deemed serious enough to demonstrate a lack of the requisite qualifications to hold a certificate.⁸

While we have affirmed summary judgment and judgment on the pleadings in some section 61.15 cases where the underlying offense did not involve aircraft use,⁹ that is not to say that summary judgment is always appropriate. To the contrary, we think that some such cases may require a hearing to evaluate the circumstances surrounding the offense in order to determine whether or not it was so egregious as to demonstrate a lack of qualifications to hold an airman certificate. While the record might, in some cases, contain enough information to make such an

⁷ The Administrator cites Administrator v. Kolek, 5 NTSB 1437 (1986), aff'd, 869 F.2d 1281 (9th Cir. 1989); Administrator v. Beahm NTSB Order No. EA-3769 (1993); and Administrator v. Hernandez, NTSB Order No. EA-3821 (1993), No. 93-9521 (10th Cir. Jan. 31, 1994), in support of his assertion that use or nonuse of an aircraft is no longer the dispositive factor in affirming revocation.

⁸ See Administrator v. Robbins, NTSB Order No. EA-4156 (1994), Administrator v. Piro, NTSB Order No. EA-4049 (1993); Administrator v. Johnson NTSB Order No. EA-3929 (1993); Administrator v. Correa NTSB Order No. EA-3815 (1993).

⁹ See Administrator v. Correa, NTSB Order No. EA-3815 (1983); and Administrator v. Kolek, 5 NTSB 1437 (1986).

evaluation without a hearing, in other cases it may not.

However, we see no need to decide in the context of this appeal which category this case falls into. In light of our decision to remand this case on the falsification charge, we think it would be appropriate to allow respondent the opportunity at that time to present evidence and argument on this issue as well.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is granted; and
2. The case is remanded for a hearing on the falsification charge under section 67.20(a)(1), and on the issue of sanction under section 61.15.

HALL, Acting Chairman, LAUBER, HAMMERSCHMIDT and VOGT, Members of the Board concurred in the above opinion and order.